Supreme Court, U.S.
FILED

031120 FEB 2 - 2004

No. 03-

IN THE

Supreme Court of the United States

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Petitioner,

v.

ELEANOR HEALD, *et al.*
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 2 of the Twenty-first Amendment of the United States Constitution prohibits importation of alcoholic beverages into any state, for delivery or use therein, in violation of the laws thereof. In the Webb-Kenyon Act, 27 U.S.C. § 122, Congress exercised its power under the Commerce Clause to impose essentially the same prohibition by federal statute.

Michigan, like many other states, generally prohibits the importation of alcoholic beverages by any unlicensed person. Michigan law permits licensed in-state wineries to ship wine directly to consumers, but does not, as a matter of right, permit out-of-state wineries (which are not licensed by the state) to do so. An out-of-state entity may locate in Michigan and be licensed as an in-state winery. The Sixth Circuit ruled that the Michigan statute is "facially discriminatory" and struck down the prohibition on importation, allowing Michigan consumers to order and receive wine from out-of-state sources without limitation. The questions presented are:

1. Whether the Sixth Circuit erred in ruling (in conflict with a Seventh Circuit decision upholding a similar Indiana statute against the same challenge) that the Twenty-first Amendment and the Webb-Kenyon Act do not authorize Michigan to enact statutes that prohibit the importation of alcoholic beverages by unlicensed persons, and that the Commerce Clause bars such statutes.

2. Whether the Sixth Circuit erred in ruling (in conflict with a Fourth Circuit decision with respect to a similar North Carolina statute) that the proper remedy for the alleged discrimination was to invalidate the state's control over importation of alcoholic beverages rather than merely strike the offending exception for in-state wineries.

LIST OF PARTIES

Petitioner, intervening defendant-appellee below, is the Michigan Beer & Wine Wholesalers Association ("MB&WWA"), a trade association of Michigan beer and wine wholesalers that intervened as a defendant in the district court.

Respondents, defendants-appellees below, are State of Michigan officials including the Governor, the Michigan Attorney General, and the Chair of the Liquor Control Commission (hereafter collectively referred to as "Michigan" or the "State"). The current holders of those offices have been substituted as parties for the former office holders pursuant to Supreme Court Rule 35.3.

Respondents, plaintiffs-appellants below, include Eleanor Heald, Ray Heald, John Arundel, Karen Brown, Richard Brown, Bonnie McMinn, Gregory Stein, Michelle Morlan, William Horwath, Margaret Christina, Robert Christina, Trisha Hopkins, Jim Hopkins, and Domaine Alfred, Inc. (hereafter collectively referred to as "plaintiffs"). The thirteen individual parties are Michigan residents who are wine consumers or wine journalists. Respondent Domaine Alfred, Inc. is a California winery.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner MB&WWA has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Michigan Beer & Wine Wholesalers Association ("MB&WWA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-18a) is reported at 342 F.3d 517. The order denying rehearing *en banc* (App. 21a-22a) is not reported. The opinion of the district court granting summary judgment for the defendants (App. 25a-35a) is not reported. The order of the district court denying reconsideration (App. 39a-40a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 2003, and rehearing *en banc* was denied on November 4, 2003. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Commerce Clause, U.S. Const. art. I, § 8, cl. 3 (App. 45a); the Twenty-first Amendment, U.S. Const. amend. XXI (App. 45a); the Webb-Kenyon Act, 27 U.S.C. § 122 (1935) (App. 46a); Mich. Comp. Laws §§ 436.1111, 436.1113(9), 436.1203, 436.1537, 436.1701, 436.1801, 436.1903, and 436.1909 (App. 47a-66a); and Mich. Admin. Code R. 436.1515, 436.1705(2)(d), and 436.1719(5) (App. 67a-69a).

STATEMENT

The Sixth Circuit has authorized Michigan consumers and out-of-state wineries to do exactly what the Twenty-first Amendment and the Webb-Kenyon Act, 27 U.S.C. § 122, expressly forbid: import alcoholic beverages into Michigan, for use by Michigan consumers, in violation of Michigan law. *See* U.S. Const. amend. XXI, § 2 ("The transportation or importation into any State ... for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."); 27 U.S.C. § 122 ("The shipment or transportation ... of any ... vinous ... intoxicating liquor ... from one State ... into any other State ... in violation of any law of such State ... is prohibited."). The Sixth Circuit dismissed as outmoded the consistent decisions of this Court holding that state authority over the physical importation of alcoholic beverages is virtually plenary. The decision below conflicts with a decision of the Seventh Circuit upholding a similar Indiana statute against the same challenge; a decision of the Eleventh Circuit rejecting "strict scrutiny" of such provisions; and a decision of the Fourth Circuit finding a similar North Carolina statute discriminatory but invalidating only the exception for licensed in-state wineries, not the state's power to control importation of wine. This case raises issues that have now been inconsistently addressed by five federal circuits and are implicated by the statutory schemes of numerous states, as evidenced by the fact that at least twelve state statutory schemes have already been challenged in similar lawsuits.

Individual Michigan residents sued Michigan's Governor, its Attorney General, and the Chair of its Liquor Control Commission (collectively, "Michigan" or the "State"), seeking both a declaration that Michigan statutory and regulatory provisions barring the shipment of wine into Michigan for delivery to any person other than a licensed wholesaler violate the "dormant Commerce Clause," and an injunction against the enforcement of the provisions. *See* Mich. Comp. Laws §§ 436.1113(9), 436.1203, 436.1909; Mich. Admin. Code R. 436.1515, 436.1705(2)(d), 436.1719(5). Two non-Michigan wineries (one of which was ultimately dismissed from the case) were added as plaintiffs, and petitioner MB&WWA, a trade association of licensed Michigan beer and wine wholesalers, intervened as a defendant.

On cross motions for summary judgment, the district court rejected respondents' challenge, holding that the statutory scheme is a permitted exercise of state power under the Twenty-first Amendment. App. 34a. The district court stated that the Michigan Legislature required imports to pass through Michigan licensees as a means to reduce the opportunities for alcoholic beverages to fall into the hands of minors and in order to assure the collection of state taxes. *Id.* at 34a-35a. It noted that out-of-state wineries are not barred from selling their products in Michigan but are merely required to do so through state-licensed wholesalers, and it rejected the contention that allowing direct shipment to consumers by licensed in-state wineries, which are physically present in the state, constitutes unconstitutional discrimination.[1]

On appeal, the Sixth Circuit reversed and remanded with instructions to grant summary judgment to the plaintiffs. The effect of doing so will be to enjoin enforcement of Michigan's statutory scheme for importation and delivery of

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[1] Licensed wholesalers must sell the imported wine to licensed retailers who are authorized to sell directly to consumers; thus all wines—whether produced in-state or out-of-state—can be sold to Michigan consumers only by licensed entities authorized to make such sales.

alcoholic beverages. The Sixth Circuit ruled that the provision allowing licensed in-state wineries to ship directly to consumers rendered Michigan's regulatory scheme "facially discriminatory" and subject to "strict scrutiny" under the dormant Commerce Clause. App. 17a. Finding that the "facial discrimination" violated that Clause, the court then turned briefly to the Twenty-first Amendment. *Id.* at 14a-15a. It ruled that Michigan's "discrimination between in-state and out-of-state wineries [does not] further[] any of the [Twenty-first Amendment's] concerns[:]," "promoting temperance, ensuring orderly market conditions, and raising revenue," (*id.* at 14a), and it concluded that the Twenty-first Amendment had no legal relevance to the case. The court did not respond to the argument of petitioner and Michigan that the Commerce Clause is not "dormant" under these circumstances, because in the Webb-Kenyon Act, Congress used its Commerce Clause power to give the states federal statutory authority, in addition to their constitutional authority, to restrict imports of alcoholic beverages.

In reaching its conclusion, the Sixth Circuit rejected a series of decisions of this Court (including, most recently, *North Dakota* v. *United States*, 495 U.S. 423 (1990)), that hold that states have virtually plenary power to regulate the physical importation of alcohol for use by their citizens. The Sixth Circuit considered this line of decisions as essentially jettisoned by this Court's decisions in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), which dealt with alcoholic beverages traveling in bond through (but not destined for use in) New York, and *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), which dealt not with importation provisions but with a discriminatory taxation scheme that the state (Hawaii) made no serious effort to defend under the Twenty-first Amendment.

The Sixth Circuit disagreed explicitly with the Seventh Circuit's ruling in *Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000) (Easterbrook, J.), which upheld a similar Indiana statute against the same challenge. In contrast to the analysis in *Bridenbaugh*, the Sixth Circuit ruled

that Michigan must justify as "needed" and "least restrictive" its decision to allow only licensed in-state wineries to ship directly to consumers, and held that the State did not meet this burden. App. 12a, 17a. The Sixth Circuit reversed the district court's grant of summary judgment in Michigan's favor, and remanded with instructions to grant summary judgment to the plaintiffs, effectively granting the plaintiffs the relief requested.

The relief plaintiffs sought consists of a declaration of unconstitutionality and an injunction against the enforcement of Michigan's prohibition of importation by unlicensed persons. In granting such relief, the Sixth Circuit eviscerated Michigan's ability to regulate importation of alcoholic beverages, even though the constitutional problem the court found lay in a provision authorizing licensed in-state wineries to ship wine to consumers—an exception inserted into the statutory scheme long after the statutory bar on unlicensed importation (which has existed since the repeal of Prohibition).[2] The effect of the Sixth Circuit's decision is to

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[2] In Michigan, a person holding the appropriate retail license can ship alcoholic beverages (including not only wines made in Michigan but equally wines imported into Michigan) to Michigan consumers subject to strict regulations to insure that alcoholic beverages do not fall into the hands of persons under 21 years of age and that taxes are paid. *See, e.g.*, Mich. Comp. Laws § 436.1111(5), (12); *id.* § 436.1203(2), (3), (4), (8). Because Michigan defines "wine maker" as a person licensed to sell "at wholesale or retail, wine manufactured by that person", a licensed "wine maker" has the ability to ship wines it manufactures to Michigan consumers. *See* Mich. Comp. Laws § 436.1113(9). Any qualified out-of-state manufacturer may establish a physical presence in Michigan and be licensed in Michigan as a wine maker. Any Michigan alcoholic beverage licensee who violates Michigan's laws and regulations governing importation, distribution or sale of alcoholic beverages is subject to license suspension or revocation and/or criminal penalties. *See, e.g.*, Mich. Comp. Laws §§ 436.1701, 436.1909. Plaintiffs' complaint sought to have Mich. Comp. Laws §§ 436.1203 and 436.1909 declared unconstitutional under the dormant Commerce Clause and enforcement of those statutes enjoined, with the effect that any out-of-state winery or retailer could directly ship wine to Michigan consumers outside of Michigan's licensed distribution scheme.

substitute its opinion for that of Michigan's legislature and to leave importation of alcoholic beverages entirely unregulated—free of state control or criminal penalties.

Petitioner and Michigan both filed petitions for rehearing *en banc*, seeking modification of both the constitutional ruling and the remedial ruling. The Sixth Circuit rejected those petitions without comment.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision results in import alcohol anarchy by suspending regulation of imports in Michigan. It conflicts with the explicit language of the Twenty-first Amendment and repeated decisions of this Court holding that the Twenty-first Amendment gives States virtually plenary power to control the importation of alcoholic beverages for use by their residents. It also conflicts with recent decisions of the Seventh, Eleventh, and Fourth Circuits concerning similar statutes of other states. The issues presented are important for many reasons including: (i) the Sixth Circuit has left Michigan unable to control the flow of alcoholic beverage into the state, impairing Michigan's ability both to keep alcohol out of the hands of persons under 21 years of age and to collect important taxes; (ii) the Michigan statutory scheme is similar to laws of many other states, several of which are under current challenge; and (iii) the effect of the decision is to make Michigan's longstanding wine distribution system, which is largely regulated by a system of licensed "tiers", unfairly advantageous to non-licensed out-of-state wineries and retailers, which may now sell free of regulation directly to consumers, to the significant detriment to Michigan and its licensed wholesalers and licensed retailers who remain subject to regulation.[3]

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[3] This regulation includes, *inter alia*, a prohibition against a licensed Michigan wholesaler or retailer from owning an interest in a manufacturer of alcoholic beverages, such as a winery.

I. THE SIXTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISIONS INTERPRETING THE TWENTY-FIRST AMENDMENT.

As this Court explained in *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984), the purpose of Section 2 of the Twenty-first Amendment was to create an exception to the "dormant Commerce Clause" for one product only, so that States could control the flow of alcohol across their borders for use by their residents. *See Crisp*, 467 U.S. at 712. Nineteenth-century cases had held that the Commerce Clause prevented States from restricting the importation of alcohol, and Congress had responded in 1913 with the first Webb-Kenyon Act, 37 Stat. 699, making it a violation of federal law to import alcohol in violation of state law. *See Clark Distilling Co* v. *W. Maryland Railroad Co.*, 242 U.S. 311 (1917). After Prohibition, the Webb-Kenyon bar was reflected in the Constitution, in Section 2 of the Twenty-first Amendment. It is significant that *after* the Twenty-first Amendment was adopted, Congress (in 1935) exercised its Commerce Clause powers by re-enacting Webb-Kenyon, 27 U.S.C. § 122. Thus, both the Constitution and a federal statute now prohibit importation of alcoholic beverages in violation of state law.

This Court has consistently held that state control over the physical importation of alcoholic beverages—the core power conferred by the Twenty-first Amendment and Webb-Kenyon—is virtually plenary. *See, e.g., State Board of Equalization of California* v. *Young's Market Co.*, 299 U.S. 59, 62 (1936) (Section 2 "confer[s] upon the State the power to forbid all importations which do not comply with the conditions which it prescribes."); *Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401, 403 (1938) ("That ... discrimination against imported liquor is permissible ... was settled by" *Young's Market.*); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U.S. 391, 394 (1939) ("[T]he right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause ...."); *Joseph S. Finch & Co.* v. *McKittrick*, 305 U.S. 395, 398 (1939); *Ziffrin, Inc.* v.

Reeves, 308 U.S. 132, 138 (1939) ("The Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause"); *Carter* v. *Virginia*, 321 U.S. 131, 137 (1944).

Nor may these foundation cases be written off as historical relics. This Court has continued to cite those cases and has continued to apply the Twenty-first Amendment as written. *See Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341, 346 (1964) ("We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit ... importation .... There can surely be no doubt, either, of Kentucky's plenary power to regulate and control ... the distribution, use, or consumption of intoxicants within her territory after they have been imported");[4] *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980) ("The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."); *Crisp*, *supra*; *North Dakota*, *supra*; *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 516 (1996) ("[T]he Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders ....").

In *North Dakota*, Justice Stevens, writing for a four-Justice plurality, observed that "[u]nder the State's regulatory system ... out-of-state ... suppliers may sell only to licensed wholesalers or federal enclaves," 495 U.S. at 428, and stated that creation of such a system "fall[s] within the core of the State's power under the Twenty-first Amendment" and that the State's regulatory system is "unquestionably legitimate." *Id.* at 432. Justice Scalia, concurring in

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[4] The quoted language was written by Justice Stewart the same day he wrote the *Hostetter* opinion discussed *infra*.

the result, said, without qualification, "The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from an in-state wholesaler." *Id.* at 447. No Justice disagreed on this point. The ultimate question in *North Dakota* was whether a state could impose special labeling requirements on alcoholic beverages destined for federal enclaves within that state (to which the Court answered "yes"). The essential premise was that the state could channel all alcoholic beverages intended for its residents through licensed wholesalers and was entitled to protect its authorized distribution system against diversion of beverage alcohol sold to federal enclaves. *See* 495 U.S. at 430-433 (opinion of Stevens, J.); *id.* at 447 (Scalia, J., concurring in judgment).

No case in this Court—indeed, no opinion of any Justice—has suggested any dormant Commerce Clause limitation on a state's power over physical importation of alcohol for use by its residents. The Court has recognized that legitimate state objectives, including tax enforcement and temperance-related objectives such as preventing sales to minors, depend on state control over the physical flow of alcoholic beverages.

The Sixth Circuit treated this Court's cases sustaining broad state power under the Twenty-first Amendment as outmoded. Under the Sixth Circuit's decision, a court must first determine if a state law limiting importation violates the dormant Commerce Clause, as if the Twenty-first Amendment and the Webb-Kenyon Act did not exist.[5] If the answer is yes, the court must then determine if the state law is needed and whether it is the "least restrictive" means to achieve a "core" objective of the Twenty-first Amendment. Thus, in place of the broad authority expressly given to states by the Twenty-first Amendment and the Webb-Kenyon Act, the Sixth Circuit would substitute the kind of

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[5] Although petitioner and Michigan forcefully called the court's attention to Webb-Kenyon, the Sixth Circuit failed even to mention it.

judicial hostility usually associated with restrictions on speech or racial classifications.

The Sixth Circuit reached this result by seriously misreading the three Supreme Court cases on which it relied: *Hostetter, supra, Bacchus Imports, supra,* and *Healy* v. *Beer Institute,* 491 U.S. 324 (1989). None of those cases limits the plenary power of states to control importation of alcoholic beverages for domestic use. On the contrary, *Hostetter* reiterates importation power in strong terms. 377 U.S. at 330 ("This Court made clear in the early years following adoption of the Twenty-first Amendment that . . . a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders."). *See also James B. Beam Distilling Co., supra.* The holding of *Hostetter,* which is irrelevant here, was that the Amendment did not apply to shipments in bonded transit for ultimate delivery outside the state. 377 U.S. at 333-334. *Bacchus* involved discriminatory taxation, not importation requirements, and the State (Hawaii) barely attempted to invoke the Amendment in its defense. *See* 468 U.S. at 274 n.12. The author of the Court's opinion in *Bacchus,* Justice White, later joined Justice Stevens' plurality opinion in *North Dakota,* which described a state statute closely controlling importation and distribution as "unquestionably legitimate." 495 U.S. at 432. *Healy* involved a pricing scheme invalidated primarily because of its impact on commerce having no relationship to the regulating state. *See* 491 U.S. at 342-343.

The Sixth Circuit invalidated Michigan's ban on wine imports by unlicensed out-of-state entities to Michigan residents because Michigan allows licensed in-state wineries to ship limited quantities of wine directly to retail customers in the state. It ignored the fact that out-of-state wineries may equally locate in Michigan and be licensed to sell directly, and, that requiring a local presence has been upheld in the tobacco sales context based on police power authority alone. *Brown & Williamson Tobacco Corp.* v. *Pataki,* 320 F.3d 200 (2d Cir. 2003). The ruling by the Sixth Circuit in the instant

case would have astonished the Justices who joined unanimously in *Young's Market*, *Mahoney*, *Indianapolis Brewing*, and *Ziffrin*. Indeed, those cases plainly implied that a state could bar all importation of wine, allowing the sale of only locally produced wines, and the Court has never held otherwise. *See, e.g.*, *Young's Market*, 299 U.S. at 63 ("Can it be doubted that a state might establish a state monopoly of the manufacture and sale of beer, and ... prohibit all competing importations ...?").

Even if state laws controlling importation are now subject to constitutional evaluation of their treatment of various categories of market participants, state control of this branch of commerce is at least entitled (under the Twenty-first Amendment, the Webb-Kenyon Act, and this Court's cases) to deference comparable to congressional regulation of other forms of commerce. If Michigan does not have plenary authority over importation of alcoholic beverages, the proper constitutional inquiry would not be the "strict scrutiny" applied by the Sixth Circuit, but whether there is a sufficient rational basis for the lines Michigan has drawn. In this case, there is ample rational basis for the Michigan system. Out-of-state sellers ordinarily have no Michigan license and no physical presence in the state. In contrast, licensed in-state firms are entities whose backgrounds Michigan can investigate, whose premises Michigan can inspect and, if necessary, seize, and whose violations can be punished by enforceable fines or by license revocation (i.e., putting them entirely out of business). Interstate enforcement against an entity that is located beyond Michigan's borders is no substitute for local control of licensees with meaningful penalties that can include immediate arrest, search and seizure, and shutting down their entire business.

The Court should grant the writ to correct a decision that is contrary to the Twenty-first Amendment, the Webb-Kenyon Act, and this Court's cases.

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE SEVENTH, ELEVENTH, AND FOURTH CIRCUITS.

The Sixth Circuit's decision conflicts directly with the decision of the Seventh Circuit in *Bridenbaugh*, which upheld a similar Indiana statutory scheme against the same challenge. Indiana, like Michigan, permits "local wineries, but not [out-of-state] wineries ... to ship directly" to consumers. 227 F.3d at 851. The Seventh Circuit noted that the Twenty-first Amendment applies specifically to "importation" and that, "Every use of § 2 [of the Amendment] could be called 'discriminatory' in the sense that plaintiffs use that term .... If that [application of § 2 to imports] were the sort of discrimination that lies outside state power, then § 2 would be a dead letter." *Id.* at 853. Reciting the history of Section 2 and this Court's interpretations, the court found Indiana's control over imports plainly within its constitutional power, notwithstanding the rights given to local wineries and licensed retailers and wholesalers. The Seventh Circuit noted that "the main effect of Indiana's system is to subject ... [the plaintiffs' purchases of out-of-state wines] to taxation, by requiring the beverages to pass through the hands of permit holders whose business is closely monitored to ensure tax collection .... [T]his is precisely what § 2 is for." *Id.* at 854.

The Sixth Circuit explicitly disagreed with *Bridenbaugh*'s approach and its result. According to the court, "The proper approach" is "to apply the traditional dormant Commerce Clause analysis," and, if the provisions are found to be facially discriminatory, to apply "strict scrutiny" to determine whether the State has "no reasonable nondiscriminatory means of advancing the 'core concerns' of the Twenty-first Amendment." App. 12a. *Bridenbaugh*, the court said, "failed to engage in the requisite dormant Com-

merce Clause analysis," (App. 15a-16a), and reached the wrong conclusion.[6]

The Sixth Circuit's decision also conflicts squarely with the Eleventh Circuit's decision in *Bainbridge* v. *Turner*, 311 F.3d 1104 (11th Cir. 2002), in which the plaintiffs challenged Florida's wine importation laws. Although the Eleventh Circuit (like the Sixth Circuit) began its analysis with the dormant Commerce Clause, it recognized that the Twenty-first Amendment requires that State laws regulating alcohol importation be given substantial deference. In direct contrast to the Sixth Circuit, the Eleventh Circuit held that a State's burden in justifying its importation restrictions "is far less than the strict scrutiny required under a traditional tier-one [dormant Commerce Clause] analysis" and that a State "need *not* show that there are no nondiscriminatory alternatives available." *Id.* at 1114 n.17 (emphasis added).

Finally, the Sixth Circuit's decision with respect to remedy conflicts with the decision of the Fourth Circuit in *Beskind* v. *Easley*, 325 F.3d 506 (4th Cir. 2003). In that case, the Fourth Circuit ruled that a North Carolina statute similar to Michigan's and Indiana's improperly discriminated between out-of-state sellers and in-state wineries, but it reached a sharply different conclusion as to the appropriate remedy. As here, the plaintiffs sought to strike down the state limits on importation. The Fourth Circuit, however, noted that North Carolina (like Michigan) had enacted its controls on importation shortly after the end of Prohibition and (like Michigan) had added far more recently its permission for licensed in-state firms to ship directly to consumers. *Id.* at 518-519. Holding that the import restriction standing alone was valid, the Court said, "we can assume that North Carolina would wish us to take the course that least destroys

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[6] The court also said that *Bridenbaugh* was "distinguishable on its facts," but the *Bridenbaugh* opinion makes clear that Indiana, like Michigan, permitted "local wineries but not [out-of-state] wineries . . . to ship directly" to consumers. 227 F.3d at 851. These are the only facts the Sixth Circuit found pertinent in the present case.

the regulatory scheme that it has put into place pursuant to its powers under the Twenty-first Amendment," *id.* at 519. Instead of alcohol anarchy as a remedy, *Beskind* remanded for a remedy excising the exception for local firms, thus leaving importation subject to regulation.

Here, the Sixth Circuit was presented with exactly the same clash with respect to the remedy for the supposed constitutional violation: plaintiffs' complaint urged invalidation of the entire statutory scheme, while petitioner and Michigan, on petition for rehearing, urged in the alternative the Fourth Circuit's remedy of merely striking the provision permitting direct shipment by local licensed winemakers. Michigan's ban on importation, like North Carolina's, can clearly stand alone if the in-state winery exception is severed: in both states, the general ban was enacted shortly after the end of Prohibition and did stand alone until the exception was adopted half a century later, in 1985, in Michigan's case. *See* 1985 Public Act No. 123, Mich. Comp. Laws § 436.1113(9). The Sixth Circuit, nonetheless, insisted on granting judgment for the plaintiffs, thus invalidating the entire direct shipment statute.

The Sixth Circuit's ruling not only destroys the keystone of Michigan's alcoholic beverage control system, namely the control over alcoholic beverage importation which the Twenty-first Amendment and the Webb-Kenyon Act expressly permit, but also has the perverse effect of discriminating in reverse. In-state sellers of wine remain subject to licensing and extensive regulation, and to monetary penalties and loss of their licenses for improper sales (such as to minors), while out-of-state sellers are now free to respond to any order they receive on the telephone or internet seeking importation, without the substantial burden of obtaining a license and complying with the myriad of laws and rules required by such licensure. As a practical matter, they are far less subject to meaningful penalties if the recipient is, for example, a minor. All of these untoward consequences result from the Sixth Circuit's mistaken belief that the "dormant" Commerce Clause gives it a commission to "im-

prove" state regulations governing imports of alcoholic beverages.

III. THE ISSUES ARE OF NATIONWIDE IMPORTANCE.

This Court should grant the writ because the issues involved are of nationwide importance and the lower courts are in urgent need of guidance on the conflicts created by the Sixth Circuit's decision. Many other states have statutes that, like those in Michigan, Indiana, North Carolina, and Florida, prohibit out-of-state sellers from shipping directly to in-state consumers but permit licensed in-state sellers to do so.[7] There is currently a wave of judicial attacks on these state statutes. In addition to the four cases discussed in Section II, *supra*, the Fifth Circuit has already issued a decision invalidating Texas's wine import laws, *see Dickerson* v. *Bailey*, 336 F.3d 388 (5th Cir. 2003), and a similar case regarding New York's laws is currently pending in the Second Circuit. *Swedenburg* v. *Kelly*, No. 02-9511 (2d Cir.). A number of other cases are pending in the federal district courts.[8] With-

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[7] Many States have similar statutes barring out-of-state suppliers from sending alcoholic beverages into the State to anyone other than the State itself or a licensed wholesaler. *See, e.g.*, Ala. Admin. Code R. 20-X-8.04(1); Ark. Code Ann. § 3-7-106(a)(1); Del. Code Ann. tit. 4, § 501; Fla. Stat. Ann. § 561.545; Ga. Code Ann. § 3-3-32; Haw. Rev. Stat. Ann. § 281-3; Ind. Code §§ 7.1-5-1-9.5, 7.1-5-11-1.5; Kan. Stat. Ann. §§ 41-104, 41-306, 41-306a(a); Ky. Rev. Stat. Ann. § 244.165; Me. Rev. Stat. Ann. tit. 28-A, § 2077-B; Md. Ann. Code art. 2B, § 16-506.1; Mass. Gen. Laws Ann. ch. 138, § 2; Miss. Code Ann. § 97-31-47; Mont. Code Ann. § 16-3-402; N.J. Stat. Ann. § 33:1-2; Ohio Rev. Code Ann. §§ 4301.19, 4301.20; N.Y. Alco. Bev. Cont. Law § 102(1)(c); Okla. Stat. Ann. tit. 37, § 505; Pa. Stat. Ann. tit. 47, § 4-410; S.C. Code Ann. § 12-21-1610; S.D. Codified Laws §§ 35-4-66, 35-4-67; Tenn. Code Ann. § 57-3-402; Tex. Alco. Bev. Code Ann. § 107.05; Utah Code Ann. §§ 32A-8-201, 32A-8-301; Vt. Stat. Ann. tit. 7, § 305; Wyo. Stat. Ann. §§ 12-2-203, 12-3-101. A number of these states permit some form of direct shipment by state licensees. *See, e.g.*, Ariz. Rev. Stat. § 4-203; Fla. Stat. Ann. § 561.57(2); Ind. Code §§ 7.1-3-13-3(a), 7.1-3-14-4(c); N.J. Stat. Ann. §§ 33:1-2(a), 33:1-10(2a), 33:10(2b), 33:1-28.1; N.Y. Alco. Bev. Cont. Law §§ 76(4), 77(2); Ohio Rev. Code Ann. § 4303.03.

[8] *See, e.g., Stahl* v. *Taft*, No. 03-CV-00597 (S.D. Ohio); *Freeman* v. *McGreevey*, No. 03-CV-03140 (D.N.J.); *Woolfson* v. *Tick*, No. 03-CV-463

out further guidance from this Court, the legal conflicts described above threaten to become worse.

The state statutes under attack are at the heart of State control over alcoholic beverages. States can enforce their rules against sales to minors, alcohol content restrictions, labeling requirements, and excise tax laws in large part *because* they can require *all* alcoholic beverages to be sold exclusively through state licensees. Michigan licensees must also abide by restrictions prohibiting wholesalers from owning interests in manufacturers or retailers. If wine can bypass state licensees and be shipped directly to consumers from across state lines, the states will lose a large measure of control over alcohol within their territories and will be frustrated in their efforts to pursue their legitimate regulatory objectives. Furthermore, although the Sixth Circuit's decision ostensibly governs only Michigan's wine laws, nothing in the opinion indicates why it would not also apply to similar regulations of competing alcoholic beverages including distilled spirits and beer. This decision, in conjunction with the other challenges, will result in the ultimate dismantling of long-standing state alcoholic beverage regulatory systems.

The Sixth Circuit's decision interferes with a state's exercise of a right not merely "reserved" to the states but explicitly granted to the states by the Twenty-first Amendment and by Congress first in 1913 and then again in 1935 when Congress re-enacted the Webb-Kenyon Act. This Court should grant the writ to resolve whether states may continue their patterns of regulating alcohol importation and what the proper remedy is if they may not. Finally, this Court should grant the writ to correct a fundamental misinterpretation of the federal-state relationship on a point about which the Constitution could not be clearer.

(D.R.I.); *Parker* v. *Morrison*, No. 03-CV-1948 (D. Ariz.); *Bainbridge* v. *Turner*, No. 99-CV-2681 (M.D. Fla.) (on remand).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 2004